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INTER SE QUESTIONS AND THE COMMONWEALTH CONSTITUTION

by

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The Queen-in-Council retains the prerogative right to entertain appeals from the "final and conclusive" decisions of the High Court by virtue of the provisions of s. 74 of the Constitution. Section 74, however, contains a limitation on that right in respect of "*inter se* questions" (namely questions, howsoever arising, as to "the limits *inter se* of the Constitutional powers of the Commonwealth and those of any State or States or as to the limits *inter se* of the Constitutional powers of any two or more States"), the limitation being that when such a question arises the High Court must certify that the question is one which ought to be determined by the Queen-in-Council before the prerogative can be exercised.

Introduction

Since the inception of the Constitution this limitation has led to much judicial consideration of the scope and meaning of "the crucial words of s. 74".[1] This has inevitably been so since "any decision as to the limits *inter se* of the Constitutional powers of the Commonwealth and the States is a decision upon an important matter".[2]

The section by its very nature has led to decisions by both the High Court and the Privy Council each mainly considering the situation before it as an original and final application or objection as the case may be. This position has, it is submitted, contributed to much of the confusion which has occurred over the years in interpreting the section. The interpretation of s. 74 has depended mainly on the nature of the provision of the Constitution under consideration. These provisions may be divided into three types, firstly where the provision contains a power which may be exercised by the Commonwealth legislature and also by the State legislatures through the retention of its absolute power (i.e., concurrent powers), secondly where the Constitution prohibits the exercise of a power by both the Commonwealth and the States and thirdly where the Commonwealth is granted an exclusive power.

The Privy Council in *Jones* v. *Commonwealth*[3] laid down a general proposition namely, that where there is "a common boundary between Federal legislative power and State absolute power . . . a sufficient mutual relationship arises between the legislative power of the States and that of the Commonwealth . . . to involve"[4] an *inter se* question. This proposition was followed and applied by both the Privy Council and the High Court until 1950.

[1] *Australian National Airways Pty. Ltd.* v. *Commonwealth* (*No.* 2) (1946), 71 C.L.R. 115 per Dixon, J., at pp. 122-3.
[2] *Australian National Airways Pty. Ltd.* v. *Commonwealth* (*No.* 2) (1946), 71 C.L.R. 115 per Latham, C.J., at p. 119.
[3] (1917), 24 C.L.R. 396; [1917] A.C. 528.
[4] *Nelungaloo Pty. Ltd.* v. *Commonwealth* (1952), 85 C.L.R. 545 per Dixon, J., at p. 563.

Concurrent powers

In 1950 in *Nelungaloo Pty. Ltd.* v. *Commonwealth*[5] the validity of reg. 19 of the Wheat Acquisition Regulations made under the National Security Act of 1939 was in dispute. It was contended that reg. 19 went beyond the constitutional limitation contained in s. 51 (XXXI) of the Constitution. On appeal to the Privy Council the objection was taken that there was no jurisdiction to entertain the appeal on the ground that an *inter se* question arose. The Privy Council stated that s. 51 was not one of the sections conferring exclusive power on the Commonwealth. It was suggested that a decision as to the extent of powers thereby conferred was in effect a decision on the concurrent powers of the Commonwealth and therefore a decision as to the limits *inter se* of the powers of the Commonwealth and the States. "Section 51 does not expressly divest the States of any power and it falls to the courts to determine where the limits of the States' powers and the limits of the Commonwealth powers are fixed."[6] The Privy Council upheld the objection.

The decision in the *Nelungaloo Case* was followed by the Privy Council in *Grace Bros. Pty. Ltd.* v. *Commonwealth*,[7] where it was decided that "any question whether the Commonwealth had exceeded the powers conferred by s. 51 was an *inter se* question".[8] However, there has been some doubt as to how far it holds to say that all powers derived under s. 51 decide questions as to concurrent powers and thereby raise *inter se* questions,[9] but it is clear that where concurrent powers do arise, there is an *inter se* question.

Powers denied to Commonwealth and States

With respect to questions arising as to whether the Commonwealth or States legislatures have intruded into fields prohibited to both legislatures by the Constitution it is clear that no *inter se* question arises. "Where the Constitution has declared that neither the Commonwealth nor the States shall have power to make laws of a certain effect and it is alleged that the Commonwealth or a State has trespassed against the prohibition there can be no question as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of any State."[10]

Commonwealth exclusive powers

There has been some considerable difficulty over the past decade in so far as the relationship of *inter se* questions to exclusive Commonwealth powers is concerned. The trouble arose in the *Nelungaloo Case* when the Privy Council stated that

[5] (1950), 81 C.L.R. 144.

[6] *Nelungaloo Pty. Ltd.* v. *Commonwealth* (1950), 81 C.L.R. 144 at p. 155.

[7] (1950), 82 C.L.R. 357.

[8] (1950), 82 C.L.R. 357.

[9] S. E. K. Hulme—*What is an Inter-se Question?—Res Judicata* Vol. VI at p. 337.

[10] *Nelungaloo Pty. Ltd.* v. *Commonwealth* (1950), 81 C.L.R. 144 at p. 154.

"when a power is declared to be exclusively vested in the Commonwealth no question can arise as to the limits *inter se* of the powers of the Commonwealth and those of any State".[11]

In *Nelungaloo* v. *Commonwealth* (*No.* 2),[12] when application was made to the High Court for a certificate under s. 74, DIXON, J. (as he then was), doubted whether this statement meant what it prima facie purported to mean. His Honour said, "It certainly states new doctrine if it means that no question *inter se* can exist where the legislative power of the Commonwealth over a subject matter is exclusive up to the exact limits of the power, so that the very boundary line of Federal exclusive legislative power is necessarily the boundary line of State Legislative power".[13]

His Honour, in the course of his judgment, suggested an explanation of the statement but it would seem that the suggested explanation is contrary to an earlier decision of His Honour in *Ex parte Nelson.*[14] In 1957 in the *Boilermakers' Case*[15] the Privy Council did not comment upon His Honour's explanation and re-stated their Lordships' view in the following terms: "If the power is one of which the exercise is exclusively vested in the Commonwealth no such (*inter se*) question arises. It is only where the delimitation of Commonwealth power necessarily implies a decision as to the extent of a subordinate state power that an *inter se* question truly arises."

The Dennis Hotels Case

The controversy caused by the above statements has been relieved by the decision of the Privy Council in the *Dennis Hotels Case.*[16] In that case the question had arisen as to whether the fees imposed by s. 19 (1) (a) and (b) of the *Licensing Act* 1928 of the State of Victoria were duties of excise within the meaning of s. 90 of the Constitution and as such were within the exclusive legislative power of the Federal Parliament. When the appellants were granted special leave to appeal, the Privy Council reserved leave to the respondents to raise a preliminary point as to the competency of the Privy Council to hear the appeal. When the appeal came before the Privy Council their Lordships held that an *inter se* question arose and that their Lordships had no jurisdiction to hear the appeal.

It is clear that s. 90 of the Constitution gives the Commonwealth power to legislate exclusively in the field of excise. The Privy Council in this case then had before it an *inter se* issue directly relating to an exclusive power as distinct from the issues that arose in the *Nelungaloo Cases* and the *Boilermakers' Case.* In this case the Privy Council dealt with the problem of *inter se* questions in relation to exclusive Commonwealth powers

[11] (1950), 81 C.L.R. 144 at p. 154.
[12] (1952), 85 C.L.R. 545.
[13] (1952), 85 C.L.R. 545 per Dixon, J., at p. 574.
[14] (1929), 42 C.L.R. 258.
[15] *A.-G. of Commonwealth of Australia* v. *R. and Boilermakers' Society of Australia* (1957), 95 C.L.R. 529.
[16] *Dennis Hotels Pty. Ltd.* v. *State of Victoria; A.-G. of the Commonwealth,* [1961] 2 All E.R. 940.

fully. Their Lordships as the basis for their decision referred to the general purposes of the enactment of s. 74, namely to allow the High Court to be final arbiter "on the purely Australian question of the distribution of the totality of governmental powers 'in Australia' unless it requested the intervention of the Sovereign in Council".[17] Their Lordships also decided that a reciprocal relation between the extent or nature of the powers on one side and the powers on the other was present. Their Lordships stated — "there is plainly a reciprocal effect on the extent or supremacy of Commonwealth and State powers respectively when a decision is given on the question whether a State cannot pass a particular law simply because only the Commonwealth can"[18] and it would appear that whatever is adopted as the test of reciprocity, questions relating to the exclusive powers of the Commonwealth are plainly *inter se* questions.

Their Lordships, in the course of their judgment, referred to their earlier statements in the *Nelungaloo Case* and the *Boilermakers' Case* and state that "Their Lordships do not think that they can regard the law as settled by these statements".[19] Their Lordships proceeded to closely examine the judgments in *Ex parte Nelson No.* 2[20] and suggested that the decision far from supporting their earlier statements lends support to their Lordships' present proposition and that "the considerations that would prevent a decision on art. 92 from involving an *inter se* question, assuming that the article bound the States alone, do not apply to a decision on the effect of art. 90 as denying to a State a power which it reserves to the Commonwealth".[21] Their Lordships also considered the explanation put forward by DIXON, C.J., in the *Nelungaloo Case* but stated that they do not adopt it.

Conclusion

It is submitted then that the following general propositions have emerged over the years and now apply:—

(a) Where the power is a concurrent power then an *inter se* question arises,

(b) where the power is denied to both States and Commonwealth alike no *inter se* question arises,

(c) where the power is a power exclusive to the Commonwealth an *inter se* question arises.

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[17] *Pirrie* v. *McFarlane* (1925), 36 C.L.R. 170 per Isaacs, J., at p. 196.

[18] [1961] 2 All E.R. 940 at p. 944.

[19] [1961] 2 All E.R. 940 at p. 944.

[20] (1929), 42 C.L.R. 258.

[21] [1961] 2 All E. R. 940 at p. 947.

CASE NOTE

Sale of Goods

Oral statement as to capacity of machine—subsequent written order making no reference to oral statement—subsequent hire-purchase agreement—whether oral statement was a term of the contract—effect of hire-purchase agreement—measure of damages—District Courts Act (N.S.W.) 1912-1957, Section 144.

At the hearing of an action for damages for breach of warranty the plaintiff led evidence that it had, after inspection, purchased from the defendant certain machinery which the defendant's salesman had stated would roll half-inch plate; that whilst this statement was doubted in view of the price of the machinery, the size of the motor and the nature of the test run the defendant's salesman had stated that if it were not so the machine would be taken back and all money paid would be refunded. A subsequent written order for the machine made out on the plaintiff's own order form contained no reference to the machine's capacity or the statements of the salesman. The purchase of the machine was effected by a hire-purchase agreement entered into between the plaintiff and a hire-purchase company which *inter alia* excluded all warranties and stated that it embodied all terms inducements and representations made or given by the hire-purchase company or any other person. The hire-purchase agreement contained no reference to the salesman's statements.

HERRON, J. (with whom COLLINS, J., concurred) was of the opinion that the statement made by the defendant's salesman as to the machine's capacity could not be treated as a mere representation inducing the contract but was evidence of a warranty for the breach of which damages could be claimed. Whether the statement was contractual or not was a question of fact to be left to the jury. The statement related to a vitally important matter so far as the plaintiff was concerned and its existence constituted a substantial ingredient in the machine. Furthermore, the view that the statement was contractual was strengthened by the further statement that the machinery would be taken back (see *Schawel* v. *Reade* (1913), 2 I.R. 64). His Honour further stated that the interposition of the hire-purchase agreement did not affect the rights of the plaintiff against the defendant nor did it operate to merge or in any way extinguish the plaintiff's rights. What these rights were could only be determined by looking at the contract made between the plaintiff and the defendant (*Brown* v. *Sheen & Richmond Car Sales Ltd.*, [1950] 1 All E.R. 1102; *Shanklin Pier Ltd.* v. *Detel Products Ltd.*, [1951] 2 K.B. 854; [1951] 2 All E.R. 471, and *Andrews* v. *Hopkinson*, [1957] Q.B. 229, applied).

His Honour further stated that the measure of damages in a case of this nature was the difference between the value of the goods at the time of their delivery and the value they would have had if they had answered the warranty. Whilst the trial judge appeared to have incorrectly directed the jury on this

point, having treated as the measure of damage the price paid for the machine together with other incidental costs, nevertheless, counsel for the defendant had not sought a different direction.

As appeals from the District Court are limited to questions of law such questions must be fairly and squarely presented to the judge for decision (*George Wills & Co. Ltd.* v. *Davids Pty. Ltd.* (1957), 98 C.L.R. 77). In His Honour's opinion this had not been done, the only submission made being that there was not sufficient evidence to satisfy the jury as to the amount of damages sustained by the plaintiff, and the claim should therefore be rejected. Accordingly, the defendant could not now raise on the appeal the question of a new trial on the basis of the trial judge's misdirection.

WALLACE, J. (dissenting), was of the opinion that the statement by the defendant's salesman as to the machine's capacity did not amount to evidence of a warranty. On the evidence it appeared that the plaintiff was relying on his own knowledge and inspection of the machine and that the defendant's statement was a representation only.

As far as the statement relating to the taking back of the machinery, His Honour stated that this was not the promise sued upon and attached little importance to it as evidence sustaining a collateral warranty. The fact that the subsequent written order contained no reference to the salesman's statements was an important factor in considering the matter (*Oscar Chess Ltd.* v. *Williams*, [1957] 1 All E.R. 325; *Cutts* v. *Buckley* (1933), 47 C.L.R. 189). This last matter, coupled with the other evidence relating to the inspection and subsequent purchase of the machinery, did not afford real evidence of a collateral warranty or promise.

His Honour was also of the opinion that the plaintiff had relied on the wrong measure of damages which the trial judge had retained in his summing up. However, His Honour was of the opinion that in accordance with the test laid down in *George Wills & Co. Ltd.* v. *Davids Pty. Ltd.* (ibid) the point of law had been sufficiently taken (*F. Jones & Co. Pty. Ltd.* v. *C. G. Grais & Sons*, [1962] N.S.W.R. 22.

NEGLIGENCE AND REMOTENESS (II)*

by

G. H. L. FRIDMAN

Overseas Tankship Case

The facts of *Overseas Tankship (U.K.), Ltd.* v. *Morts Dock & Engineering Co., Ltd.*, [1961] I All E.R. 404, were as follows. The appellants were the charterers of the *Wagon Mound*, which was discharging gasolene products and taking in bunkering oil at a wharf in Sydney Harbour. Through the carelessness of the appellants' servants a large amount of bunkering oil was permitted to spill into the bay, so that the oil spread, concentrating particularly along the foreshore near the respondents' property at Morts Bay, Balmain, in Sydney Harbour. The appellants did nothing to disperse the oil. The respondents were doing some work, involving electric and oxy-acetylene welding, at their wharf. This was stopped while their works manager inquired of the manager of the wharf where the ship was whether it would be safe to continue the work in view of the presence of the oil. The advice given, based upon certain scientific opinions as to the nature of the oil, was that there was no danger: an opinion which the respondents' works manager shared. The work at the respondents' wharf was therefore continued, instructions being given that safety precautions should be taken to prevent inflammable material falling off the wharf into the oil. For two or three days the work was continued without any incident. Eventually, however, the oil, which was still thick in the water around the wharf, ignited, causing great damage to the wharf and the ship moored alongside it on which the respondents were working. The fire was caused by the setting on fire by molten metal falling from the wharf of a piece of cotton waste or rag, which in turn set the floating oil alight. Then the flames spread quickly over the floating oil and eventually reached the wharf.

It was found by the trial Judge that, on the basis of the scientific evidence, the appellants did not know and could not reasonably be expected to have known that the oil was capable of being set afire when spread on water.

The trial Judge and the Full Court of the Supreme Court of New South Wales held that the appellants were liable, basing their decision upon the case of *Re Polemis*, and the principle there stated that once a person had been guilty of negligence he was liable for all the direct consequences of that negligence. Here the appellants had been negligent in letting the oil spill into the bay: the direct consequence of that negligence was the fire which damaged the respondents' property: therefore the appellants were liable for that damage.

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* By courtesy of *The Law Journal*, England.

The Privy Council, however, approached the case by examining the decision in *Re Polemis*, the authorities which supported it, and upon which it was based, the cases before *Re Polemis* which were inconsistent with it, and the cases after *Re Polemis*, in which its authority and reasoning have been questioned. The main reason for doubting the validity of the *Polemis* principle was that it did not fit in with the criterion applicable to determine culpability or liability, which, as seen above, was whether the harm or damage involved was reasonably foreseeable, or could be contemplated by the reasonable man.

As a result the Privy Council considered that the authority of *Re Polemis* had been severely shaken and the case could no longer be regarded as good law. This would lead to the simplification of the law, and the avoidance of palpable injustice. For, in the words of the Privy Council: ". . . it does not seem consonant with current ideas of justice or morality that, for an act of negligence, however slight or venial, which results in some trivial foreseeable damage, the actor should be liable for all consequences, however unforeseeable and however grave, so long as they can be said to be 'direct'. It is a principle of civil liability . . . that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilized order requires the observance of a minimum standard of behaviour" ([1961] 1 All E.R., at p. 413).

The basis of liability for consequences of a negligent act is not that such consequences were "natural", "necessary" or "probable", but that, because such consequences were of such a quality, they ought to have been foreseen by the reasonable man. The two grounds are not really coterminous, though they have often been treated as such. Where they are not the one that is applicable is the one which was rejected in *Re Polemis*, a rejection which was wrong and unjustifiable. Some limitation must be imposed on the consequences for which a negligent actor is to be held responsible (as seen above). Why then should reasonable forseeability be rejected, when such a test corresponds with the common conscience of mankind, since the actor is judged by what the reasonable man should foresee, and the test of "direct" consequences substituted, when that test leads to nowhere but the never-ending and insoluble problems of causation? For the *Polemis* principle led to some very difficult problems on the nature of "direct" consequences, which, in fact, as seen above, in some circumstances really involved the Courts in deciding that a direct consequence was one that was foreseeable; for, as already seen, it was only where the consequence was an immediate physical consequence that the negligent person was liable for it on the principle of directness. Where the consequence was not such (as in *The Edison*), or where the negligence was not the immediate or precipitating cause of the damage, the negligent actor was not liable for it.

The fact that such casuistry had to be invoked to explain the working of the rule, and to limit its application while adhering loyally to it, proved that the rule was really unworkable, though this was something the Courts tried to disguise.

Thus, the abolition of the *Polemis* principle would lead to the rejection of the kind of complicated manoeuvring of the notion of causation that was involved in earlier cases where the *Polemis* principle was affirmed and at the same time rejected as a deciding factor. However, the principle was not only the cause of complications: it also was fundamentally unsound and unjust. The explanation of this takes us back to the earlier discussion of the principles upon which a duty of care can be said to exist and apply in a given situation.

It was seen above that the test of duty is foresight of harm. But, as the Privy Council pointed out, the test of duty is not whether an act is wrongful, but whether its consequences are harmful. Until damage is caused there can be no liability: there is no such thing as negligence in the air. Hence, in deciding whether conduct is negligent, regard must be paid to its consequences. If they are foreseeable as being harmful then the conduct is negligent: but if no harm can be foreseen, there is nothing negligent about the conduct in question. Thus, to determine whether a person is guilty of negligence it is necessary to decide whether the harm which his conduct caused was foreseeable by the reasonable man as a consequence of his conduct, i.e., whether it was foreseeable as regards the person who was injured, or as regards the kind of damage which was inflicted on a person in respect of whom some damage was foreseeable. It should make no difference whether more damage is caused to A. than was foreseeable as likely in the event of negligence by B., or whether damage is caused to C. when damage was only foreseeable to A. In both cases there should be liability only to the person to whom, and to the extent to which damage was foreseeable.

Foreseeability is, therefore, the effective test of liability in negligence, whether the question is whether a duty of care was owed to A. or whether a duty of care that is owed to A. extends to cover the damage which has in fact occurred to A. as a consequence of the negligence of the person whose liability is in question. This is the decision in the *Overseas Tankship* case.

Its effects

The most immediate result of this decision is that the duality of rules relating to remoteness in negligence has been abolished. There will now be no doctrine of direct or natural consequences. This doctrine was really a departure from the underlying moral idea behind the law of negligence. For it produced liability upon the basis of the occurrence of consequences irrespective of any blameworthiness in respect thereof. Now the tests for determining the existence, definition and scope of a duty of care and for deciding whether a negligent act was the proximate cause of damage have been assimilated. That

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test is the test of foresight, as seen above, and it is a test that brings out very clearly the moral and social elements in negligence liability. Thus, it will now be unnecessary to distinguish, as was done above, between dynamic and static situations in respect of remoteness; nor will it be necessary to treat the question of duty (i.e., culpability, or liability) separately from that of remoteness, or compensation. The ideas contained in the judgment of DENNING, L.J., in *Roe* v. *Ministry of Health* (*supra*) have been approved and established by the Privy Council: viz., was the consequence within the risk created by the negligence?

Thus, *Re Polemis* has been overruled. What is the effect of this upon the so-called *talem qualem* rule, i.e., that the tortfeasor takes his victim as he finds him? It was suggested earlier that the case of *Re Polemis* really is an illustration of the operation of this rule, in that it could be explained on the basis of interference with a state of things as in fact they were, not as they ought to have been, or were foreseeably likely to have been. But it can also be said that the *talem qualem* rule is distinct from the *Polemis* principle (though there does not appear to be any direct authority on the rule). If that rule and the *Polemis* principle are but two aspects of the same approach to questions of remoteness, then the *Overseas Tankship* case clearly abolished both. But, if the *talem qualem* rule is distinct, it remains to be seen whether the emphasis upon foresight of consequences made in the *Overseas Tankship* case means that the *talem qualem* rule is no longer applicable. For it may be argued that if the condition of a victim is not foreseeable, then, on the approach of the *Overseas Tankship* case there should be no liability for damage resulting from the peculiar, unforeseeable condition of the victim, e.g., if he has an egg-shell skull which results in his death when the ordinary man would only have suffered some minor injury from the negligence in question. Since the test of duty and of remoteness is foresight of consequences, there should be no room now for the *talem qualem* rule, because a duty only exists, and liability can only result where the reasonable man would foresee the possibility not only of damage of any kind, but of damage of the particular kind that in fact was suffered.

Another question is the effect of the *Overseas Tankship* case upon torts other than negligence. Does the decision have the effect of making liability for such torts extend only to foreseeable damage, or foreseeable consequences? The Privy Council expressly stated that they had not considered cases of strict liability, such as *Rylands* v. *Fletcher*, and that they did not intend to reflect on that rule. Can any distinction therefore be made? The only clue offered by the *Overseas Tankship* case itself is the stress there laid upon the *moral* basis of liability for negligence. It was the lack of moral justification for the *Polemis* principle in respect of damage that seems to have weighed very heavily with the Court. On that basis, where tortious liability does depend upon some fault on the part of the

defendant (e.g., in cases where the proof of liability depends upon proof of careless conduct, or the intentional infliction of harm), it might be argued that the *Overseas Tankship* approach should be applied, and there should be liability only for such consequences as were foreseen, or ought to have been foreseen by the reasonable man, or were intended by the wrongdoer, or can be taken as having been intended by him by the application of the doctrine that every man is presumed to intend the natural and probable (i.e., foreseeable by the reasonable man?) consequences of his acts. But where the liability in tort is strict (as in *Rylands* v. *Fletcher*) there is no moral basis for such liability, which instead is founded upon ideas of convenience and protection against increased risks of harm, irrespective of any fault on the part of the actor in the creation of such risks, and therefore there should be liability for all consequences which are direct, regardless of whether they were foreseeable. This is a possible approach. But, in view of the dislike evidenced by the Privy Council for the notion of direct or natural consequences, its problems and its artificiality, the present writer is of the opinion that it is doubtful whether the distinction drawn above will be made. These, however, are questions for future decisions to answer. For the moment one difficult part of the law of torts has been clarified and simplified, and it may now be possible to put and to keep the principle of negligence in a nutshell.

CURRENT LEGISLATION

Conveyancing (Strata Titles) Amendment Bill, 1961.

The objects of this Bill are —

(a) to provide that a lot, used solely for residential purposes, shall be land with an unimproved value calculated in accordance with its unit entitlement;

(b) to provide that non residential lots are to be subject to land tax of an amount proportionate as prescribed to the land tax that would have been payable upon all lots within the parcel, not exempt from land tax, were such lots owned by one taxpayer;

(c) To assess, in addition, the liability of the owner of a non residential lot upon all lands, together with the lot, owned by him but subject to provisions to avoid double taxation;

(d) to make other amendments of an ancillary character.

Co-operation (Amendment) Bill, 1961.

The objects of this Bill are —

(a) to provide that certain minors who execute mortgages with the consent of the co-operative building advisory committee in favour of building societies shall be bound thereby as if they were of the full age of twenty-one years;

(b) to prohibit permanent building societies registered after the commencement of the Act to give effect to this Bill from carrying on business unless the Registrar of Co-operative Societies is satisfied that certain founding members, including directors, hold shares in the society to the value of £500, restrictions being imposed on the transferability of such shares;

(c) to enable the Registrar, with the approval of the Minister, to impose restrictions on existing permanent building societies, or to wind them up, unless their directors hold shares in the society to the value of £500, restrictions being imposed on the transferability of such shares;

(d) to prohibit new building societies from issuing certain advertisements without the permission of the co-operative building advisory committee;

(e) to authorise the Registrar, with the approval of the Minister, to give directions relating to certain advertisements issued by building societies;

(f) to enable the Registrar to refuse to register as the name of a society a name which in his opinion is undesirable;

(g) to vary the provisions of section 48 of the Co-operation Act, 1924-1960, relating to reserve funds of societies;

(h) to provide that the provisions of section 58 of the Act relating to payments to nominees of deceased members shall cease to apply except in respect of nominations made before the commencement of the Act to give effect to this Bill;

(i) to authorise societies to pay up to £200, or to transfer shares to the value of up to £200, upon the death of a member without production of probate or letters of administration;

(j) to remove the requirement that certain investments may only be made by a society if authorised by special resolution;

(k) to make different provision with respect to the registration of the alteration of rules of a society;

(l) to vary certain agreements in relation to guarantees given under the Government Guarantees Act, 1934-1948, to persons who have made loans to building societies so as to permit such societies to make loans up to £3,250 instead of £3,025;

(m) to make other provisions of a minor or consequential nature.

Money-lenders and Infants Loans (Amendment) Bill, 1961.

The objects of this Bill are to —

(a) exclude from the operation of the Money-lenders and Infants Loans Act, 1941, as amended by subsequent Acts:—
  (i) bona fide transactions entered into by a vendor (not being a money-lender licensed under the Act) of goods for the sale of goods by him where time for payment has been postponed;
  (ii) hire purchase agreements and credit sale agreements whether or not the owner, vendor or seller being a party to such agreements is a money-lender licensed under the Act;
  (iii) loans to companies in respect of which debentures were or are issued in pursuance of an application therefor made in a form issued with a prospectus;

(b) exclude from the operation of Part III of the Act (excepting sections 21, 30 and 30A) —
  (i) loans to companies;
  (ii) loans in excess of £5,000;
  (iii) loans to finance the erection of buildings in excess of £5,000, where provision is made for progressive advances;
  (iv) loans where the interest rate does not exceed the overdraft rate charged by the Commonwealth Trading Bank of Australia at the time of the making of the loan;

(c) penalise unlicensed money-lenders carrying on the business of money-lending;

(d) increase the jurisdiction of courts of petty sessions in respect of money-lending transactions to £500;

(e) amend the provisions of section twenty-two of the Act with respect to the note or memorandum of contract presently required under that section;

(f) dispense with the consent of a spouse to a money-lending transaction where both husband and wife jointly sign the contract and increase to £50 the existing minimum amount required to be lent before a spouse's consent is necessary to a money-lending transaction;

(g) empower a court to re-open a money-lending transaction in certain circumstances so as to confirm or validate a money-lending transaction which fails to comply with the requirements and provisions of the Act;

(h) require the borrower in certain circumstances to be given notice of intention to repossess goods the subject of a bill of sale (not being a trader's bill of sale) given as security for a money-lending transaction, and amend section 40A of the Act to provide penalties where the grantor of a bill of sale refuses or fails to comply with the order of a court of petty sessions for the delivery up of goods comprised in such bill of sale;

(i) increase to £50 the amount for which a cash order may be issued, and provide for add-on transactions to the extent that a cash order may from time to time during its currency be varied, provided that the amount of the cash order as varied, does not at any time exceed £50;

(j) make other provisions of a minor or ancillary character.

VALE KENNEDY ALLEN

Quite recently there passed from our company in Brisbane, at the advanced age of eighty-three years, a kind and courtly gentleman whose passing will leave a large gap in the realm of legal editorship.

The late William Kennedy Abbott Allen—"Kennedy" to his Queensland fellow practitioners — was well known as a scholar of the old school. Whether a writing under consideration was in Greek or Latin or Italian an acceptable and accurate rendering into pure and well selected Queen's English was always and immediately available from Kennedy Allen.

Dr. Allen was a Bachelor of Arts of Dublin University and was called to the Irish Bar via King's Inns, Dublin, on 8 June 1907, and thereafter admitted to the Queensland Bar on 1 September 1908. Thereafter he practised at the Queensland Bar in the Central Supreme Court at Rockhampton before transferring to Brisbane.

He was the author of a most useful publication, "The Justices Acts of Queensland, 1886 to 1932, with Conspectus, Annotations and Supplementary Forms", a work which the Chief Justice at the time of publication (Sir James Blair) said "filled a *hiatus* in the legal literature of Queensland, and is remarkable for its exhaustive research, masterly exposition and lucid arrangement".

A second edition was required and published, and in 1956 the call for a third edition was satisfied by this indefatigible author. He also wrote on Police Offences legislation.

Dr. Allen was assistant managing editor and the Queensland annotator of the Reprint of the Public Acts of Queensland, and, up to a few years before his death, he was engaged in the annotations to the Sessional Volumes of the Queensland Statutes.

It was on a consideration of his written contributions to legal learning that a few years ago the University of Queensland conferred upon him a doctorate of philosophy.

To him also must be attributed much other legal writing.

Dr. Allen often acted as examiner for the law examinations of the Barristers Board and the Solicitors Board.

He was appointed and for a time sat as an Acting Judge of the Supreme Court in North Queensland.

His "outside" activities were cultural and he knew and understood his Shakespeare as few do, and for a number of years was a leader and President of the Shakespeare Society in Brisbane.

His knowledge and love of the classics was profound and his very considerable dislike of sloppiness or lack of precision in the use of words was often manifested, and yet his kindly corrections of others less well-informed were not taken amiss by those he aided, for he had the way of the true scholar in his unostentatious emendations. His rulings in matters importing scholarship were inevitably accepted by his brethren in the law and others in the sure and certain knowledge of their accuracy.

In Queensland, Kennedy Allen will be missed; he leaves a blank in the companionship and scholarship of the Queensland Bar.

Fitting memorials to our departed friend are in his annotations and publications and he would desire no better commendation than "Well done, thou good and faithful servant"—a reward which is assuredly his.

F. T. CROSS.

CASE NOTE

Matrimonial Causes

Supreme Court of Tasmania—Matrimonial Causes—Constructive desertion — Effect of offer of reconciliation — Matrimonial Causes Act 1959, ss. 28 (b) and 29.

The principles relating to the interpretation of Sections 28 (b) and 29 of the *Matrimonial Causes Act* 1959 were discussed in *Manning* v. *Manning* (1961), 2 F.L.R. 257.

Section 29 of the Matrimonial Causes Act provides that "a married person whose conduct constitutes just cause or excuse for the other party to the marriage to live separately or apart, and occasions that other party to live separately or apart, shall be deemed to have wilfully deserted that other party without just cause or excuse, notwithstanding that that person may not in fact have intended the conduct to occasion that other party to live separately or apart".

BURBURY, C.J., stated that s. 29 has dispensed with the necessity of proof by the petitioner of the intentional abandonment of the matrimonial relationship by the respondent which had been required to be established under the pre-existing law.

This subjective intention had formerly been inferred where the respondent left the matrimonial home without just cause or excuse or might be inferred from misconduct by the respondent causing the innocent party to withdraw from the matrimonial home.

Under s. 29 there are now two broad questions of fact for the Court to determine. These are —

1. Whether the respondent's conduct is conduct affording just cause or excuse for the petitioner initially withdrawing from cohabitation, and,
2. Whether, having regard to all the evidence, it can be said that the respondent's conduct has occasioned the petitioner to live separately or apart from the respondent for the statutory period of two years.

As to the first question, the conduct affording just cause or excuse for living separately or apart must be conduct of a nature recognized by the Court as being sufficiently grave to justify one spouse withdrawing from cohabitation. The question of the reasonableness of the departure of the petitioner in the light of the respondent's conduct is to be viewed objectively. The Court must not merely isolate the misconduct relied upon and if proved conclude that there is just cause and excuse but must consider the whole of the conduct of the parties.

As to the second question, the section relates to conduct justifying living separately or apart for the statutory period of two years. Where the Court finds that the initial misconduct is sufficiently grave to justify the petitioner withdrawing from cohabitation it will in the absence of any other evidence ordinarily infer that this misconduct has occasioned the separation for the entire statutory period. But where there have been subsequent meetings and discussions between the parties a question of causation arises and the Court must then determine whether the initial misconduct has continued to occasion the separation. In this regard, the petitioner's attitude of mind may be considered. Where the petitioner rejects a genuine offer of reconciliation made by the respondent to resume cohabitation and the petitioner makes it clear that she will not have the respondent back, then it may be concluded that the initial misconduct no longer occasions the separation. This is a question of fact in every case and will depend to a great extent on the gravity of the initial misconduct. Whereas under the pre-existing law an offer of reconciliation was relevant to rebut the *animus deserendi* it now becomes a relevant factor in determining whether the continuing element of causation of the *factum* of the separation has existed throughout the statutory period.

Section 29 does not use the term "constructive desertion" at all. The section has created a fiction by equating the conduct referred to in the section to the matrimonial offence of desertion. It is really an anomaly to describe expulsive conduct without intention to desert as desertion. The section has in effect created a new matrimonial offence.

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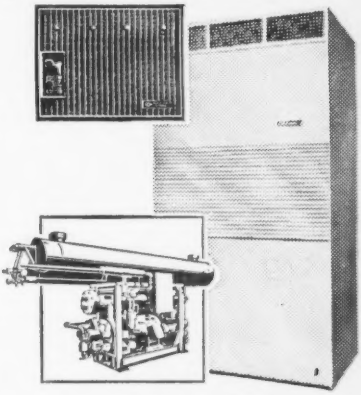

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